Supreme Court, U.S.
FILED
OCT 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-493

WALTER RAYMOND WHITE,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

STATE OF INDIANA, *Ex Rel.*
WALTER RAYMOND WHITE,

Petitioner,

vs.

THE MARION SUPERIOR COURT,
CRIMINAL DIVISION, No. 3, and
THE HONORABLE CHARLES C. DAUGHERTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondents, the Marion Superior Court, Criminal Division, No. 3, the Honorable Charles C. Daugherty, and the State of Indiana respectfully pray this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 579S119, on June 27, 1979.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 391 N.E.2d 596 and may be found in Petitioner's Appendix, page A-1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

In addition to those set forth in the appendix to the petition, the following statutes and rules are involved and are set forth in the appendix to this Brief:

(1) The statute authorizing appeals in criminal cases, Indiana Code 35-1-47-1, compiled in Title 35, Book 1, Burn's Indiana Statutes Annotated, Code Edition (1979 Replacement), pages 169-170.

(2) The rules governing Motion to Correct Errors prior to an appeal, Rule 16, Indiana Rules of Criminal Procedure, compiled in Court Rules, Book 2, Burns Indiana Statutes Annotated, Code Edition, page 628, and Rule 59, Indiana Rules of Trial Procedure, compiled in Court Rules, Book 1. Burns Indiana Statutes Annotated, Code Edition, pages 340-342.

(3) The rules for perfecting an appeal from a final judgment in Indiana, Rules 2 and 3, Indiana Rules of Appellate Procedure, compiled in Court Rules, Book 2, Burns Indiana Annotated Statutes, Code Edition pages 464 and 470, respectively.

STATEMENT OF THE CASE

Petitioner was charged, by information, with two counts of murder. Jury trial commenced and during three days of trial there were ten witnesses called by the State. The

tenth witness was Josefino C. Aguilar, M.D., a deputy coroner who had performed autopsies on the bodies of the two victims. On March 13, 1979, the doctor refused, in the presence of the jury, to answer one question propounded by the State, four questions propounded by the defense, and two questions propounded by the court. (A 6-7)

March 14, 1979 began with the defense motion for a mistrial upon the ground that the court had given the jury preliminary instructions which incorrectly instructed on the burden of proof applicable to the defense of insanity. (R. 100, 101). The motion was overruled, (R. 103), and Dr. Aguilar was called for his testimony on redirect examination. (R. 103, 216, 217). The doctor refused to answer the court's inquiry regarding the cause of a wound on a victim. (Pet. A-23). The refusal to answer was maintained under the court's order to answer. (Pet. A-24). The doctor was found in direct contempt of court, and his attempt to purge himself, alleging lack of sufficient courtesy from the prosecutor's staff, was found to be insufficient. The court imposed a fine of Fifty Dollars ($50.00) and a jail term of five (5) days (Pet. A-28), caused the doctor to be removed from the courtroom, and discharged the jury declaring a mistrial. (Pet. A-23, 29, 30). Defense counsel formulated an objection which was overruled. (Pet. A-30).

The following day, March 15, 1979, Defendant filed a Motion to Dismiss and For Discharge of Defendant together with an Affidavit in support thereof, alleging that further prosecution is barred by the former prosecution ending in mistrial. That motion was overruled on April 6, 1979.

On April 24, 1979, the Supreme Court of Indiana entertained an original action entitled "Verified Petition for

Writ of Mandate and Writ of Prohibition" brought by the Defendant without requiring formal filing, assignment of a cause number, and payment of court costs. The original action sought the issuance of a Writ of Mandate against the Respondents mandating the dismissal of the information filed against Walter Raymond White, his discharge, the prohibition of a second trial, and an order to show cause why such Writs should not be made permanent. (Pet. A 34-37). The Supreme Court of Indiana took the case under advisement, and denied the petition on April 27, 1979. The grounds for denying the petition, that the trial court did not abuse its discretion in declaring a mistrial and that the Petitioner had an appropriate legal remedy of appeal, were announced to the parties without a formally prepared opinion, pursuant to the entertainment of the petition which had not been formally filed.

The Defendant filed, on May 1, 1979, in the trial court, a motion to certify that if the court had erred by denying Defendant's motion to dismiss, that such denial involves a question of law requiring early determination, and that the remedy by appeal is inadequate. The motion for certification was overruled on May 2, 1979.

Also on May 2, 1979, the Verified Petition for Writ of Mandate and Writ of Prohibition was formally filed in the Supreme Court of Indiana. The court denied the application for a permanent writ on June 27, 1979, holding that the trial judge had the discretionary power to declare a mistrial and the remedy of appeal is adequate to challenge such discretionary action. Therefore, the question presented to the court was not a proper subject for an original action.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE OPINION BELOW IS NOT A FINAL DETERMINATION OF THE QUESTION PETITIONER HAS PRESENTED FOR REVIEW

The sole Question Presented For Review in the petition is whether the right against double jeopardy forbids retrial of the defendant after the trial court has declared a mistrial. The Supreme Court of Indiana did not decide that question.

In its opinion (Pet. A 1-A 3) the Supreme Court of Indiana merely held that the question of whether or not the trial court abused its discretion in granting the mistrial is not a proper subject for an original action in Indiana. The opinion reads, in pertinent part, as follows:

> The orderly procedure of the trial should be left to the sound discretion of the court trying the case. *State ex rel. Rooney v. Lake Cir. Ct.* (1957) 236 Ind. 345, 140 N.E.2d 217. The granting or denial of a motion for mistrial falls within this rule and will be reversed only where an abuse of judicial discretion is demonstrated. *Bean v. State* (1978) — Ind. —, 371 N.E.2d 713; *Short v. State* (1968) 250 Ind. 459, 237 N.E.2d 258.
>
> The respondent in the case at bar had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial. The remedy of appeal is adequate to challenge the trial court's discretion in this matter. The question presented is therefore not a proper subject for an original action.

The Indiana Supreme Court clearly did not decide the merits of Petitioner's double jeopardy claim.

Petitioner's reliance on *Harris v. Washington*, 404 U.S. 55 (1971), to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257 is misplaced. In *Harris*, the state's highest court did decide the double jeopardy claim and *held* that the doctrine of collateral estoppel did not bar a second trial of the defendant. After the state's highest court had unequivocally rejected the double jeopardy claim, this Court found there was a final decision pursuant to 28 U.S.C. § 1257(3). The linchpin supporting jurisdiction in *Harris, supra,* is not present in this case. The Supreme Court of Indiana did not reject Petitioner's double jeopardy claim. The opinion below is based solely on Indiana's original action procedures.

This Court has announced and adhered to the principle that before certiorari review of a state court decision is appropriate, a federal question must be properly presented to the state's highest court pursuant to reasonable state procedures. If the state court finds that the question is not properly presented pursuant to its procedures, this court will not review that decision absent a showing that the state court has interposed an unreasonable state procedural rule merely to evade a federal question. *See e.g., Wolfe v. North Carolina,* 364 U.S. 177, 195 (1960); *Parker v. Illinois,* 333 U.S. 571, 575 (1948); *Nickel v. Cole,* 256 U.S. 222, 225 (1921). The state procedural rule involved in the opinion below is neither arbitrary nor unreasonable. It is a fundamental rule that an original action is an inappropriate procedure to seek review of discretionary actions of the trial court. The rule is applied with virtually no exceptions in Indiana.[1]

[1] The opinion below cites *State Ex Rel. Socony Mobil Oil Co. v. Delaware Cir. Ct.,* 245 Ind. 154, 196 N.E.2d 752 (1964), and *State Ex. Rel. Jones v. Smith,* 220 Ind. 645, 46 N.E.2d 199 (1943) for the rule. The principle is firmly entrenched in Indiana and Indiana cases discussing original actions reiterate the rule.

II.

THE DECISION BELOW DOES NOT FORECLOSE STATE COURT REVIEW OF THE DOUBLE JEOPARDY CLAIM

Petitioner seeks to buttress his position that the decision below rejects his double jeopardy claim by asserting that he has "utilized every State procedure to seek review of his double jeopardy claim prior to enduring a second trial." (Pet. p. 14, fn. 2). He also asserts that the Supreme Court of Indiana held "that Petitioner's legal remedy by way of an appeal *after a second trial* is adequate to challenge Petitioner's double jeopardy claims." [Emphasis ours]. (Pet. p. 14, fn. 2). Neither assertion is adequately supported by the record.

The decision of the Supreme Court of Indiana does not state that Petitioner's State appellate remedies are restricted to an appeal from a conviction *after a second trial.* The opinion below states only that an appeal rather than an original action is the proper Indiana procedure for review of Petitioner's double jeopardy claim. The decision does not imply, and Petitioner should not infer, that a reference to "an appeal" in Indiana means only an appeal following conviction after a second trial.

Upon denial of the Motion for Dismissal and For Discharge of Defendant in the trial court, two appellate procedures were available. One is the interlocutory procedure discussed in the petition (Pet. p. 14, fn. 2), and the other is an appeal from the denial as a final judgment adjudicating a collateral issue in the case.[2] Neither of these appellate

[2] Appeals from a final judgment or order in a criminal case are governed by statutes, Burns Ind. Ann. Stat. IC 35-1-47-1, (Code Edition),

procedures was initiated by Petitioner before he sought extraordinary relief by way of an original action in the Supreme Court of Indiana.[3]

Petitioner has relied on *Abney v. United States,* 431 U.S. 651 (1977), throughout these proceedings to support his claim that he has a right to a pre-trial review of the trial court's rejection of his double jeopardy claim. At the same time, he ignores the *Abney* decision insofar as it determines whether there is a final judgment for purposes of an appeal.[4]

(A-2) and by Rules of the Supreme Court of Indiana. A motion to correct errors filed in the trial court is a necessary condition preceding an appeal from a final order. Rule 16, Indiana Rules of Criminal Procedure, and Rule 59, Indiana Rules of Trial Procedure, (A 2-4). Upon denial of that motion to correct errors, the appeal is initiated by filing a *praecipe* for the record of proceedings pursuant to Rule 2, Indiana Rules of Appellate Procedure. (A-5). The appeal is then filed when the record of proceedings is filed with the Clerk of the Supreme Court. Rule 3, Indiana Rules of Appellate Procedure, (A-5).

[3] Petitioner initiated the original action on April 16, 1979 by application to the Administrator of the Supreme Court of Indiana pursuant to Rule 1(B)(3), Indiana Rules of Original Actions. (Pet. p. A12-A13). Under Indiana procedure, the original action is not filed with the Clerk of the Supreme Court until after the action is heard and orally decided. If a temporary writ is denied, an official opinion is issued and published only if a party then files the proceedings with the Clerk of the Indiana Supreme Court. *See,* Bagni, Giddings and Stroud, *Indiana Appellate Procedure,* Ch. 14, (West 1979) for a general description of original action procedures in Indiana.

The original action below was heard on April 14, 1979 and orally denied on April 27, 1979. Petitioner sought an official published opinion by filing the proceedings with the Clerk of the Supreme Court on May 2, 1979. (Pet. p. A34-A37). The record of proceedings transmitted by Petitioner to the Supreme Court of Indiana for the original action does not contain reference to, or copies of, any actions in the trial court after April 16, 1979, the date the original action was commenced. Consequently, neither Petitioner's motions in the trial court subsequent to April 16, 1979, nor the trial court's rulings thereon were before the Supreme Court of Indiana in the original action.

In particular, the Supreme Court of Indiana had no record of Petitioner's Motion for Certification pursuant to A.P. 4(b)(5), (Pet. p. A32-33), and his Motion to Correct Errors (A-1), both filed on May 1, 1979. Likewise, the trial court's actions on those motions were not of record.

The Indiana Supreme Court has not yet had occasion to decide whether Indiana's final judgment statute,[5] in light of *Abney, supra,* includes the denial of a motion to dismiss based upon a double jeopardy claim. However, in an analogous situation involving a pre-trial appeal from an order setting bail, the Supreme Court of Indiana adopted this Court's final decision construction in *Stack v. Boyle* 342 U.S. 1 (1951). In *Bozovichar v. State* 230 Ind. 358, 103 N.E.2d 680 (1952), the court permitted a pre-trial appeal from an order denying bail, stating:

> [A]s above stated, it was held in Stack v. Boyle, supra, that the matter of the reasonableness of bail as fixed by the trial court was appealable under an act giving the right to appeal "from all final decisions of the district courts". Our statute extends to the defendant the right to appeal "from *any judgment* in a criminal action against him." (emphasis supplied) Burns' 1942 Repl. § 9-2301. We can see little, if any, difference between the right to appeal

[4] While petitioner filed in the trial court the Motion to Correct Errors necessary to perfect an appeal from a final judgment on May 1, 1979, (A-1), he has taken no further action to perfect an appeal from the denial of that motion. *See,* fn. 2, describing the Indiana appellate process.

[5] Burns Ind. Ann. Stat. IC 35-1-47-1, (Code Ed.) [A-2].

[6] In both *Stack* v. *Boyle* 342 U.S. 1 (1951) and in *Abney v. United States* 413 U.S. 651 (1977), the rationale supporting pre-trial appellate review is the same. In both cases, the nature of the rights asserted, (right to bail pending trial and the right not to endure a second trial), is such that there is no remedy for a violation of the rights following a conviction on the underlying crime. A court reviewing the issues after conviction could not release the defendant prior to the already consumated trial nor could it then prevent an already consumated second trial. Thus, this Court in *Stack v. Boyle, supra,* and *Abney, supra,* and the Indiana Court in *Bozovichar, infra,* determined that there were final decisions on issues collateral to the issue of guilt or innocence, and appealable pre-trial.

> from "all final decisions" and the right to appeal from "any judgment in a criminal action". We conclude that the judgment under consideration is appealable under Burns' 1942 Repl. § 9-2301. (footnote omitted) 103 N.E.2d 680, 682-683.

Indiana's response to *Stack v. Boyle, supra,* indicates what Indiana's response[7] to *Abney, supra* might be if the question is presented to the Indiana Supreme Court in accordance with well established appellate procedures.

Contrary to his assertion that he has utilized every available state procedure to obtain pre-trial appellate review of his double jeopardy claim, Petitioner has not pursued a direct appeal from what *Abney, supra,* and *Bozovichar, supra,* suggest is a final appealable judgment. Rather than perfect an appeal, Petitioner brought a highly disfavored original action. An original action cannot be used to circumvent the appellate process in Indiana.[8] The opinion below does not foreclose any avenues of appellate review, but merely reiterates the fundamental principle of Indiana law that an appeal, not an original action, is the proper procedure to seek review of a trial court's exercise of its discretion.[9]

---

[7] *Contra, Miller v. State,* 8 Ind. 325 (1856) holding that denial of double jeopardy claim was not a final appealable order. The case, however, was decided long before the 1905 statute governing final appealable orders, long before *Bozovichar v. State, supra* and over one hundred years before *Abney v. United States, supra.*

[8] Rule 1(A), Indiana Rules of Procedure for Original Actions, (Pet. A13-15).

[9] *See,* fn. 1, *supra* and authorities cited therein.

III.

PETITIONER FAILED TO RAISE A FEDERAL QUESTION BELOW

Rule 19(1)(a) of the rules of this Court provides for a writ of certiorari to a state court where that court has decided a federal question not theretofore decided by this Court, or has decided a federal question contrary to applicable decisions of this Court. In the "Verified Petition for Writ of Mandate and Writ of Prohibition" filed in the Supreme Court of Indiana, the denial of which gave rise to the Petition herein, Mr. White did not allege the violation of any federal rights. See Pet. App. A-34 *et seq.* In paragraphs 6 and 7 of that Verified Petition, White stated:

> 6. That the lower Court has not only a constitutional duty, but also a statutory duty to grant the Relator's "Motion to Dismiss and for Discharge of Defendant" as provided by Indiana Code 35-41-4-3, for the reason that prosecution is barred by reason for a former prosecution.
>
> 7. That on April 6, 1979, the lower Court refused to perform that statutory duty, by denying such Motion (Tr. p. 161).

The paragraph 6 reference to a "constitutional duty" had not previously been made in the Verified Petition and did not elaborate as to whether it referred to a federal right or a state right under Article 1, § 14 of the Constitution of Indiana. In addition, the decision of the Indiana Supreme Court was not based on federal law, but was based solely on Indiana law.

Therefore, the respondents would submit that White has not raised any federal question below, and that this Court lacks jurisdiction to grant the Petition for Writ of Certiorari pursuant to Rule 19(1)(a).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION TO CORRECT ERRORS

Comes now the defendant, Walter Raymond White, by counsel, Robert D. Hollingsworth, and moves the Court to correct the following error which occured in the above cause. On March 15, 1979, the defendant filed his "Motion to Dismiss and for Discharge of Defendant," on the grounds that prosecution is barred by reason of a former prosecution, a copy of which appears in words and figures, to-wit:

(H.I.)

On April 6, 1979, this Court erred by denying such Motion. Wherefore, defendant moves the Court to correct is error by granting the defendant's "Motion to Dismiss and for Discharge of Defendant," and for all other proper relief in the premises.

/s/ Robert D. Hollingsworth
Attorney for Defendant

Official Certified Copy, True and Complete. Bernard J. Gohmann, Clerk of Courts.

/s/ Beverly Stigall
Clerk or Deputy

INDIANA STATUTE

35-1-47-1 [9-2301]. **Appeal by defendant—Decisions and orders reviewed.**—An appeal to the Supreme Court or to the Appellate Court [Court of Appeals], may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed.

INDIANA RULES OF CRIMINAL PROCEDURE

Criminal Rule 16

MOTION TO CORRECT ERRORS; FILING WITH JUDGE OR CLERK

In all criminal cases the defendant shall have sixty [60] days from the date of sentencing to file motion to correct errors. It shall be deemed sufficient filing of a motion to correct errors within sixty [60] days following the date of sentencing in a cause if said motion is filed with the judge having jurisdiction of the cause, who shall immediately make a docket entry showing the filing thereof, or if said judge is not available for the presentation and the entry of said motion, then said motion to correct errors shall be filed with the clerk of the court in which said cause is pending, in vacation or in term-time, and the clerk shall immediately thereupon note the filing of said motion to correct errors on the court's docket in the cause, and the clerk shall thereafter call said filing of said motion to correct errors to the attention of the judge in the case at the first opportunity. Trial Rule 59 (Motion to Correct Errors) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by this court for the conduct of criminal procedure.

INDIANA RULES OF TRIAL PROCEDURE

Trial Rule 59

MOTION TO CORRECT ERRORS

(A) Motion to correct errors—When granted. The court upon its own motion or the motion of any of the parties for or against all or any of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, including, without limitation, the following:

(1) denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any

order of court, abuse of discretion, misconduct or the jury or prevailing party;

(2) accident or surprise which ordinary prudence could not have guarded against;

(3) excessive or inadequate damages, amount of recovery or other relief;

(4) the verdict or decision is not supported by sufficient evidence upon all necessary elements of a claim or defense, or is contrary to the evidence specifically pointing out the insufficiency or defect;

(5) uncorrected error of law occurring and properly raised in the proceedings or prior to, at or subsequent to the trial;

(6) newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial;

(7) correction of a judgment subject to correction, alteration, amendment or modification;

(8) the verdict or decision being contrary to law specifically pointing out the insufficiency or defect; or

(9) for any reason allowed by these rules, statute or other law.

(B) Form of motion. A motion to correct error shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by the set rules, by statute or by other law. The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based.

(C) When motion to correct errors must be filed. A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment.

(D) Motion to correct errors on affidavits—Opposing affidavits, cross-errors and other matters. When a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion. The opposing party has fifteen [15] days of service of affidavits in which to serve opposing affidavits and fifteen [15] days after service of the motion in which to file cross-errors or in which to assert relevant matters relating to the kind of relief to be granted. The period for filing affidavits may be extended for an additional period not exceeding thirty [30] days for good cause shown or by written stipulation.

(E) Relief granted on motion to correct errors. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the issues:

(1) grant a new trial;

(2) enter final judgment;

(3) alter, amend, modify or correct judgment;

(4) amend or correct the findings or judgment as provided in Rule 52(B);

(5) in the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) grant any other appropriate relief, or make relief subject to condition; or

(7) in reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a nonadvisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment

upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the finding shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

(F) Costs in the event new trial ordered. The court in granting new trial, may allow the same at the costs of the party applying therefor, or on the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary.

(G) Motion to correct error a condition to appeal. In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal

only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

INDIANA RULES OF APPELLATE PROCEDURE

Appellate Rule 2

INITIATION OF THE APPEAL AND NOTICE TO OPPOSING PARTIES

(A) Initiation of the appeal. An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty [30] days after the court's ruling on the motion to correct errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

(B) Notice to opposing parties. All parties of record in the trial court shall be parties on appeal. Pursuant to the provisions of Appellate Rule 12, all opposing parties shall be served with a copy of all papers filed after the appeal is submitted. The appellate tribunal may order such additional notice to the parties as justice may require.

Appellate Rule 3

SUBMISSION OF THE APPEAL

(A) Submission. Every appeal shall be deemed submitted and the appellate tribunal deemed to have acquired jurisdiction thereof on the date the record of the proceedings is filed with the clerk of the Supreme and Appellate Courts.

(B) Time within which the appeal must be submitted. In all appeals and reviews, except those from interlocutory orders, the record of the proceedings must be filed with the clerk of the Supreme and Appellate Courts within ninety

[90] days from the date of the judgment or the ruling on the motion to correct errors, whichever is later. In appeals and reviews of interlocutory orders the record of the proceedings shall be filed within thirty [30] days of the ruling. However, if the statute under which the appeal or review is taken fixes a shorter time, the time fixed by the statute shall prevail.

TRANSCRIPT OF THE TRIAL PROCEEDINGS ON MARCH 13, 1979 R. 212-214

(Cross Examination of Dr. Aguilar by Defense Counsel)

"A. Exactly, what do you mean by that question?

Q. I mean, did you form an opinion as to what had caused the wound on the body of Constance Many and, Lazalia Stack, that you have described, to a reasonable degree of medical certainty?

A. Well, you are asking me for my expert opinion?

Court: He asked you if you formed an opinion, that requires a yes, or no, answer.

A. Well, ---- .

Court: Just answer, yes, or no.

A. Yes.

Court: All right, ask another question, now.

CROSS EXAMINATION RESUMES:

QUESTIONS BY MR. HOLLINGSWORTH;

Q. What is that opinion?

A. I respectfully refuse to make that opinion." (R. 206)

• • •

"Q. What about the stomach content of Constance Many?

A. 386 miligrams per deciliter.

Q. What does that mean, doctor?

. . .

A. --- I refuse to answer the question, Your Honor.

Mr. Hollingsworth: Will your Honor direct the witness to answer?" (R. 209)

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"Q. Do you have an opinion as to a reasonable degree of medical certainty, as to whether four percent blood alcohol can kill somebody, in and, of itself?

A. Yes.

Q. Can it?

. . .

CROSS EXAMINATION RESUMES:

QUESTIONS BY MR. HOLLINGSWORTH:

Q. You may answer, doctor.

A. I don't want to give any opinion regarding that question.

Q. You don't,

A. I refuse to give an opinion regarding that question." (R. 212, 213)

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"Q. Do you have an opinion to a reasonable degree of medical certainty, as to whether a person's judgment would be affected at .24 blood alcohol?

A. Yes.

Q. What is that opinion?

A. I refuse to answer that question.

Q. Why do you refuse to answer?

A. Because as I said before, I am here as just a factual witness, let an expert witness give you an opinion.

Q. Well, I didn't call you as a witness, and, I don't understand why you won't answer me, you're an expert, you ----.

A. ---- no, I was never qualified as an expert in this case, sir."

(R. 214)

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